Supreme Court U.S.
FILED
APR 15 1985
ALEXANDER L. STEVAS,
CLERK

84-1631

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVEN WALTER LUCAS,
Petitioner,

vs.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE SUPREME COURT OF THE STATE OF MISSOURI

ROST & CALLAHAN
RICHARD G. CALLAHAN
(Counsel of Record)
THOMAS H. ROST
109 East High Street
Jefferson City, Missouri 65101
(314) 634-2563
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

3888

QUESTIONS PRESENTED

1. Whether the Supreme Court of Missouri violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution by exceeding the scope of its review power over civil judgments under state law and reversing a judgment on the basis of an alleged error which was not presented to or expressly decided by the trial judge.

2. Whether the Supreme Court of Missouri violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution by violating its own court rules and reversing a judgment on the basis of instructional error even though the complaining party failed to present any allegation of instructional error at the trial court level.

TABLE OF CONTENTS

Questions Presented I
Table of Authorities III
Opinions Below 1
Jurisdiction of This Court 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 6
Reasons for Granting the Writ 9
Conclusion 13
Certificate of Service 13

Appendix A—

(Missouri Supreme Court Opinion of Lucas v. Daniel International Corp.) A1

Appendix B—

(Petitioner's Request for Rehearing and Order Denying Same.) A7

TABLE OF AUTHORITIES

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 11
Lindsey v. Normet, 405 U.S. 56 (1972) 12
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 9
Sanders v. Daniel International Corp., 682 S.W.2d 803 (Mo. banc 1984) 1, 8
Standard Oil Co. v. Missouri, 224 U.S. 270 (1912) 11
U.S. Const. Amend. XIV, § 1 ..... 2, 9
Mo. Const., Art. V, § 5 ..... 2, 10
§ 512.160 Mo.Rev.Stat. 3, 10
70.01 Mo. Rules of Court 4, 7
70.02 Mo. Rules of Court 4
78.07 Mo. Rules of Court 5, 10
84.13 Mo. Rules of Court 5
Missouri Approved Jury Instructions 10.01, 1981 ..... 7, 8
Missouri Approved Jury Instructions 16.01, 1981 ..... 6, 8
Missouri Approved Jury Instructions 23.07, 1981 ..... 6, 8

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVEN WALTER LUCAS,

Petitioner,

vs.

DANIEL INTERNATIONAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioner, Steven Walter Lucas, respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Missouri to review its judgment and opinion issued anent this case on December 18, 1984.

OPINIONS BELOW

The decision of the Supreme Court of Missouri is reported at 682 S.W.2d 820 (Mo. banc 1984), and a copy of its opinion appears in the Appendix hereto. The Supreme Court of Missouri concluded that its holding in another case, *Sanders v. Daniel International Corp.*, controlled the disposition of the case at bar. The *Sanders* case is reported at 682 S.W.2d 803 (Mo. banc 1984). Petitioner's Request for Rehearing was denied without opinion. A copy of the Request for Rehearing and the Order denying same are reprinted herein in the Appendix.

JURISDICTION

Petitioner seeks review of a judgment issued by the Supreme Court of Missouri, entered on December 18, 1984. Petitioner timely raised the federal questions in his Motion for Rehearing, which was denied on January 15, 1985. The federal questions were raised at the first appropriate instance. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1), (2), and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article V, § 5 of the Constitution of Missouri provides the following:

> Section 5. Rules of practice and procedure—duty of supreme court—power of legislature. The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination

of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

3. Section 512.160 Mo.Rev.Stat. provides:

512.160. Questions considered on appeal—disposition by court—damages—executions.—1. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.

2. No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action.

3. The appellate court shall examine the transcript on appeal and, subject to the provision of subsections 1 and 2, award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as such court ought to have given, as to the appellate court shall seem agreeable to law. Unless justice requires otherwise the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears.

4. Upon the affirmance of any judgment or order, or upon the dismissal of any case, the appellate court may award to the respondent such damages not ex-

ceeding ten percent of the amount of the judgment complained of as may be just, and when such judgment shall be affirmed for part of the sum of which judgment was rendered by the trial court, such part of said judgment shall bear lawful interest from the date of the rendition of the original judgment in the trial court.

5. The appellate court, upon the determination of any case on appeal, may award execution to carry the same into effect, or may remand the case, with the decision, to the trial court from whence the cause came, and such determination shall be carried into execution by such trial court.

4. Rule 70.01 of the Missouri Rules of Civil Procedure provides as follows:

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

5. Rules 70.02 (b) and (c) of the Missouri Rules of Civil Procedure provide as follows:

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this

Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

6. Rule 78.07 of the Missouri Rules of Civil Procedure provides as follows:

> In jury tried cases, other than cases tried with an advisory jury, allegations of error to be preserved for appellate review must be included in a motion for a new trial except that questions of jurisdiction over the subject matter, questions as to the sufficiency of the pleadings to state a claim or defense and questions authorized by Rule 72.01 to be presented in motions for judgment need not be included in a motion for new trial. Where definite objections or requests were made during the trial in accordance with Rule 78.09, including specific objections to instructions, a general statement in the motion of any allegations of error based thereon is sufficient. Any specific objections to instructions which were not made at the trial before submission to the jury, must be set forth in the motion for new trial to preserve the error for review. Allegations of error based on matters occurring or becoming known after final submission to court or jury shall be specifically set out.

7. Rule 84.13 (c) of the Missouri Rules of Civil Procedure provides as follows:

> (c) Plain Error may be Considered. Plain errror affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

STATEMENT OF THE CASE

This petition arises from a cause of action for malicious prosecution which was most recently tried to a jury in Pettis County, Missouri, on July 24, 1982. The jury returned a verdict in favor of petitioner in the amount of $200,000.00 actual damages and $750,000.00 punitive damages. The trial court then granted respondent a remittitur of $450,000.00 with respect to punitive damages and thereafter entered judgment in favor of petitioner in the amount of $500,000.00.

In the trial of the case, the jury was given thirteen instructions, three of which are relevant to this petition and are as follows:

INSTRUCTION NO. 5

The term "malicious" or "maliciously" as used in these instructions does not mean hatred, spite, or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse.

MAI 16.01

INSTRUCTION NO. 7

Your verdict must be for plaintiff if you believe:

First, defendant instigated a judicial proceeding against plaintiff which terminated in favor of plaintiff, and

Second, in so doing defendant acted maliciously and without reasonable grounds, and

Third, plaintiff was hereby damaged,

unless you believe that plaintiff is not entitled to recover by reason of Instruction No. 9.

MAI 23.07

INSTRUCTION NO. 11

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction No. 7 was willful, wanton, or malicious, then in addition to any damages to which you find plaintiff entitled under Instruction No. 10 you may award plaintiff an additional amount as punitive damages in such sums as you believe will serve to punish defendant and to deter it and others from like conduct.

MAI 10.01

All three of these instructions are "form jury instructions" approved and adopted by the Missouri Supreme Court, en banc, by order dated May 12, 1981. With respect to jury instructions, Missouri operates under a form instruction system wherein the Missouri Supreme Court adopts and approves jury instructions, the use of which is mandatory. Rule 70.01 of the Missouri Rules of Civil Procedure provides as follows:

> Approval of instruction in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

The court-approved instructions are published through the West Publishing Company of St. Paul, Minnesota, in a book entitled *Missouri-Approved Instructions*. In a malicious prosecution lawsuit, a plaintiff is required to use, among others, MAI 23.07 for its verdict directing instruction, MAI 10.01 for its punitive damage submission, and MAI 16.01 for the definition of the term "malicious or maliciously". Petitioner in this case used the required instructions and thus complied with Rules in effect at the time his malicious prosecution action was tried.

The respondent Daniel International Corporation appealed to the Missouri Court of Appeals, Western District. Neither during the trial, nor in its motion for a new trial, nor on appeal did respondent ever make an allegation of error concerning the trial judge's giving of the three instructions.

Before any action was taken by the Court of Appeals, this case was transferred to the Supreme Court of Missouri because another malicious prosecution case involving similar facts was already pending before the Court, although the two cases were never consolidated.

On December 18, 1984, the Supreme Court of Missouri reversed and remanded petitioner's cause of action relying on the case of *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo. banc 1984), decided the same day. The *Sanders* decision held that the court-appointed MAI instruction which defined the terms "malicious" or "maliciously" should no longer be used in malicious prosecution cases. On January 2, 1985, petitioner moved for rehearing, alleging that the Supreme Court's reliance on the *Sanders* decision deprived him of due process and equal protection under the United States Constitution because the allegation of error determinative in *Sanders* was

never raised nor preserved in petitioner's case. Petitioner's motion for rehearing was denied on January 15, 1985.

REASONS FOR GRANTING THE WRIT

The issue presented in this petition is whether the Supreme Court of the State of Missouri, by arbitrarily choosing to ignore the preservation requirement for appellate review under state law, violated petitioner's rights secured by the Fourteenth Amendment to the United States Constitution.

As a threshold question, petitioner must establish that he has been deprived of life, liberty or property to invoke the due process clause. However, this Court has often stated that property protected by the Fourteenth Amendment is not limited to the traditional notions of tangible objects, but extends through many different types of rights. The recent case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) reviews the various kinds of interests which this Court has held to be property. In *Logan* the Court held that due process clauses "protect civil litigants who seek recourse in the courts," *Id.* at 429, and further held that a plaintiff's right to pursue a cause of action was a property right protected by the Fourteenth Amendment. Petitioner's case is even more compelling than that of the plaintiff in *Logan* in that petitioner has not lost a nebulous right to pursue a cause of action, but has lost a judgment of easily determinable value.

Petitioner comes to this Court because he has not been afforded the procedural due process which the Fourteenth Amendment requires. The right of appeal in Missouri courts is purely a matter of legislative grace. Al-

though Article V, Section 5 of the Missouri Constitution grants the Missouri Supreme Court rule-making authority, that section also prohibits any rule from changing the right of appeal. The right of appeal should not be viewed as simply a one-sided procedure existing only for benefit of an appellant, but rather is a statement of rights for both sides, also outlining for any respondent his rights and protections for a judgment entered on his behalf. Section 512.160.2 requires that aside from sufficiency and jurisdictional questions, allegations of error must have been presented at the trial level in order to be considered by Missouri appellate courts. In the instant case, the respondent not only failed to present the allegation of error to the trial court, respondent also failed to present the allegation of error to any appellate court.

Aside from ignoring the statutory confines on its scope of review in civil cases, the Missouri Court also ignored the restraints self-imposed by its own Rules. Rule 78.07 of the Missouri Rules of Civil Procedure requires that for an allegation of error concerning jury instructions to be preserved for appellate review, the allegation must be made either at trial before submission to the jury or in the motion for new trial. Yet, neither at trial, nor in its motion for new trial, nor in any brief on appeal did respondent ever complain that the jury instructions misstated the definition of malice. Because the allegation of error was never preserved, petitioner received no notice of its materiality on appeal; because the allegation was never presented to an appellate court, petitioner received no hearing.

The process denied petitioner is no mere formality. The adversarial system is the cornerstone of American jurisprudence. When an appellate court is allowed to reverse a judgment on grounds neither preserved nor pre-

sented, the judiciary no longer serves as an arbiter of disputes but arbitrarily usurps the role of the legislature.

A case nearly analogous to petitioner's is *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, the Supreme Court of Missouri reversed the trial court's decision on grounds which had not been briefed or argued. *Id.* at 677. This Court ruled that the effect of the Missouri Supreme Court's decision was to deprive that petitioner of an opportunity to preserve his claim and held that due process had been violated in extremis.

An older case dealing with the process as it applies to the judiciary is *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912). In *Standard Oil*, the Supreme Court of Missouri in a quo warranto proceeding assessed both the penalty of ouster and a fine. The petitioner Standard Oil challenged the ability of the court to levy a fine, arguing that it was not on notice that a fine could be levied. Although eventually holding that both the fine and the ouster were proper, this Court discussed the basic elements of due process and stated:

> Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

Id. at 281.

The petitioner's case is precisely within the principles set forth. The petitioner was given notice and hearing on one set of issues and was deprived of its judgment on another. The hearing given him was worthless insofar as his ability to protect his verdict. Furthermore, and even more critical, statutory law as well as court rule prohibited the Supreme Court of Missouri from considering and reversing the petitioner's judgment on the grounds asserted in its opinion.

By choosing to ignore the preservation requirement when it suits its purpose, the Missouri court sets itself above the rule of law leaving litigants at the whim of the court with seemingly no recourse. The judiciary serves as a check and balance on unwarranted expansions or abuse of power by the legislative and executive branches of government. However, just as important, but institutionally more difficult, is that the judiciary also police itself. The preservation requirement as a prerequisite to appellate review is an obvious limitation on the power of appellate courts. The typical bureaucratic response, if unchecked, is to "exception" such a limitation out of existence. However, the ultimate result of such a response is a situation like petitioner's: a judgment is reversed on an allegation of error which was neither presented at trial, nor in the motion for new trial, nor in brief on appeal, nor in oral argument; the final irony is that the so-called error was contained in a jury instruction which the petitioner was required to give by mandate of the very court which later finds error.

In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court held that the right of appeal cannot be handled arbitrarily or capriciously without violating the Fourteenth Amendment. While petitioner recognizes that his individual plight may not be a concern of this Court, petitioner nevertheless

believes that the facts in this case present a clear example of a "judiciary out of control" and an opportunity for this Court to remind inferior courts throughout our nation that the power to ignore the law should not be confused with the power to interpret the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROST & CALLAHAN
RICHARD G. CALLAHAN
(Counsel of Record)
THOMAS H. ROST
109 East High Street
Jefferson City, Missouri 65101
(314) 634-2563
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing were mailed, postage prepaid, this 15th day of April, 1985, to:

Kelly Pool
Hendren & Andrae
235 East High Street
P. O. Box 1069
Jefferson City, Missouri 65102

RICHARD G. CALLAHAN
Attorney for Petitioner

APPENDIX

APPENDIX A

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

Appeal From the Circuit Court of Pettis County
Honorable Donald L. Barnes, Judge

Respondent, Steven Walter Lucas, brought this suit for malicious prosecution against appellant Daniel International Corporation in the Circuit Court of Callaway County. The cause initially was tried in Cole County on a change of venue. The jury returned a verdict for respondent, awarding him $250,000 in actual damages and $200,000 in punitive damages. The trial court sustained a motion for a new trial, apparently on the ground that the verdict was so grossly excessive as to indicate bias, passion and prejudice. The case was retried in the Circuit Court of Pettis County and the jury returned a verdict for respondent in the sum of $200,000 in actual damages and $750,000 punitive damages. The trial court granted a remittitur of $450,000 on the ground that the punitive dam-

age award was excessive and against the weight of the evidence. Appellant thereupon appealed to the Court of Appeals, Western District, and respondent cross-appealed. Pursuant to Rule 83.06, the Western District recommended transfer prior to opinion in light of our taking transfer in Sanders v. Daniel International Corp., ... S.W.2d ..... (Mo. banc 1984) [No. 65529, decided December 18, 1984], decided herewith. We reverse and remand.

The facts surrounding the criminal prosecution from which the case arises are identical in all relevant respects to those in *Sanders*. Reference should be made to that case for a complete statement of the circumstances prompting this litigation. For our purposes, it is sufficient to note that respondent herein was one of seven persons charged on the basis of a complaint signed by appellant's agents, with the misdemeanor of attempted theft of tools and gauges valued at over fifty dollars. The prosecutor later dismissed the charges.

Appellant has raised several points on appeal, but we need not address these questions because we conclude our holding in Sanders v. Daniel International Corp., *supra*, controls the disposition of this appeal. In *Sanders*, we held that a plaintiff suing on a theory of malicious prosecution must prove that the defendant initiated the prosecution "primarily for a purpose other than that of bringing an offender to justice." *Sanders, supra,* at ..... [slip op. at 22], *quoting* Restatement (Second) of Torts § 668 (1965). In addition, we held that to qualify for punitive damages in a malicious prosecution action, a plaintiff must prove that the defendant acted out of actual malice, i.e., that his conduct was "prompted or accompanied by ill will, or spite, or grudge, . . ." *Sanders, supra,* at ..... [slip op. at 28-29], *quoting* E. Devitt & C. Blackmar, 3 Federal Practice and Instructions 85.11, at 121 (3rd ed. 1977).

The judgment is reversed and remanded for retrial consistent with our opinion in *Sanders*, *supra*, at ..... [slip op. at 27].

.....

Warren D. Welliver, Judge

Higgins, Billings and Donelly, JJ., concur; Blackmar, J. concurs in result in separate opinion filed; Rendlen, C.J., dissents in separate opinion filed; Gunn, J. dissents in separate opinion filed.

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

OPINION CONCURRING IN RESULT

I agree that the judgment should be reversed and the case remanded for new trial for the reasons stated in my Opinion Concurring in Result in Sanders v. Daniel International Corporation, No. 65529, handed down today.

.....

Charles B. Blackmar, Judge

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI

EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

DISSENTING OPINION

I respectfully dissent and would reverse the judgment of the trial court for the reasons set forth in the dissenting opinion of Judge Gunn. Again however, as in the Sanders v. Daniel International Corp. ..... S.W.2d ..... (No. 65529 Mo. banc December 18, 1984), I endorse the suggested jury instruction forms set forth in the separate opinion of Judge Blackmar by which he concurs in result in that case.

.....

Albert L. Rendlen, Chief Justice

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

DISSENTING OPINION

For the reasons stated in my dissenting opinion in Sanders v. Daniel International Corporation, ... S.W.2d ..... (No. 65529 Mo. banc December 18, 1984), I dissent from the majority opinion here. The record appears desolate of evidence of any malice by defendant.

.....
George F. Gunn, Jr., Judge

APPENDIX B

(Filed January 2, 1985)

IN THE SUPREME COURT OF MISSOURI
EN BANC

STEVEN WALTER LUCAS, Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65793
DANIEL INTERNATIONAL CORPORATION, Defendant-Appellant-Cross-Respondent.	)	

MOTION FOR REHEARING

Comes now plaintiff-respondent Steven W. Lucas and moves the court for rehearing in the above case for the reason that the court in its opinion of December 18, 1984, overlooked and failed to address the issue of whether it has the authority to apply the rationale set forth in *Sanders v. Daniel International Corporation*, ... S.W.2d ..... (Mo. banc 1984) [No. 65529, decided December 18, 1984] to the appeal in this case because defendant failed to raise "malice" as an issue before any court; or, alternatively, whether the new rules announced in *Sanders* should be applied retroactively to trials occurring before the date of the *Sanders* decision.

I.

1. The court in its opinion of December 18, 1984, overlooked and failed to address the fact that neither at trial, nor in its motion for a new trial, nor in any brief on appeal, did defendant ever raise in this case the issue

that the MAI definition of "malice" misstated Missouri law or that the Missouri definition of "malice" should be changed.

2. The right of appeal in civil actions is solely a matter of legislative grace; Article V, section 5 of the Missouri Constitution prohibits this court from otherwise expanding or contracting that right of appeal. The legislature has defined the scope of appeal in civil cases in subsections 1 and 2 of section 512.160 RSMo.

3. Subsection 1 of section 512.160 requires that an allegation of error must be presented to or expressly decided by the trial court in order to be considered on appeal. Because defendant never raised the issue of whether the MAI definition of "malice" misstated Missouri law or whether the Missouri definition of "malice" should be changed, the *Sanders* rationale is not dispositive of the appeal in this case under the authority of this subsection.

4. The alternate basis for appellate review, subsection 2 of section 512.160, requires error on the part of the trial court. Supreme Court Rule 70.02 mandates the giving of the MAI definition of "malice" to the exclusion of any other definition; consequently, the trial court can hardly be said to have committed error in the giving of the required definition when any failure to give the MAI definition already has been declared by this court to be error. Rule 70.02(c).

5. The court's opinion reversing the judgment rendered in favor of plaintiff because of the *Sanders* rationale thus exceeds the court's authority under section 512.160 and Articles II and III of the Missouri Constitution; furthermore, by granting this defendant a broader appellate review than that created by the legislature, by ignoring constitutional and legislative restraints on the court's reviewing authority, and by treating plaintiff differently

from other respondents similarly situated, the court has violated plaintiff's rights to due process, equal protection, and a jury trial secured under both the Missouri and United States Constitutions.

II.

6. The court in its opinion of December 18, 1984, overlooked and failed to address the question of whether the new law announced in *Sanders* is to be applied retroactively to cases tried prior to the date of the decision or whether the decision is to be applied prospectively only. Implicit in the decision in this case is a holding that the *Sanders* rule is to be applied retroactively, even though a retroactive application is inconsistent with this court's practices, conflicts with prior decisions, and works an injustice on litigants required to follow pattern instructions promulgated by this court.

WHEREFORE, plaintiff-respondent respectfully requests that the court grant plaintiff-respondent a rehearing.

Respectfully submitted,

Rost & Callahan
By /s/ Richard G. Callahan
Richard G. Callahan
Missouri Bar No. 24290
109 East High Street
Jefferson City, MO 65101
314-634-2563

By /s/ Charles R. Miller
Charles R. Miller
Missouri Bar No. 28722
109 East High Street
Jefferson City, MO 65101
314-634-2563

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

January 15, 1985

Mr. Richard G. Callahan
109 East High
Jefferson City, Missouri 65101

In re: Steven Walter Lucas vs. Daniel International Corporation, No. 65793

Dear Mr. Callahan:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Plff.-Resp.-Cross-App.'s motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Mr. John E. Burruss, Jr.

Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1631

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVEN WALTER LUCAS,
Petitioner,

vs.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

HENDREN AND ANDRAE
JOHN H. HENDREN
(*Counsel of Record*)
KELLY POOL
GERALD E. ROARK
The Monroe House
235 East High Street, Suite 210
P. O. Box 1069
Jefferson City, Missouri 65102
(314) 636-8135
Attorneys for Respondent

E. L. Me

BEST AVAILABLE COPY

36 pp

QUESTIONS PRESENTED

1. Whether the Supreme Court of Missouri's opinion in *Lucas v. Daniel International Corporation,* 682 S.W.2d 820 (Mo. banc 1984), reversing and remanding the matter for a new trial, and subsequent Order overruling a motion for rehearing, constitutes a "final judgment", which is required to petition the Supreme Court of the United States for certiorari.

2. Whether the Supreme Court of Missouri's opinion in *Lucas v. Daniel International Corporation,* 682 S.W.2d 820 (Mo. banc 1984), and subsequent Order overruling a Motion for Rehearing, rests upon an independent and adequate nonfederal ground which supports the judgment.

3. Whether the issues in the instant case present special and important questions sufficient to warrant the issuance of a writ of certiorari.

4. Whether the Supreme Court of Missouri afforded petitioner due process, as secured by the Fourteenth Amendment to the United States Constitution, when it allowed to be filed and subsequently considered petitioner's Motion for Rehearing which contained petitioner's Constitutional considerations.

5. Whether the Supreme Court of Missouri exceeded its review power when it reversed and remanded a civil judgment on the basis of instructional error, as provided for under state law, when said instructional error was not expressly presented to or expressly decided by the trial judge.

6. Whether the Supreme Court of Missouri may reverse and remand a civil judgment in *Lucas v. Daniel International Corporation,* 682 S.W.2d 820 (Mo. banc 1984), to be consistent with the companion case of *Sanders v. Daniel International Corporation,* 682 S.W.2d 803 (Mo. banc 1984), which was decided by the same Court on the same day as the instant action.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF AUTHORITIES III
OPINION BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 4
REASONS FOR DENYING THE WRIT 5

I. Preliminary Statement 5
II. *Lucas* Opinion Is Not a Final Judgment 6
III. *Lucas* Opinion Rests on Adequate and Independent State Grounds 9
IV. No Special or Important Questions Are Presented 10
V. Petitioner Received Due Process Considerations 11
VI. Plain Error May Be Considered on Appeal 12

CONCLUSION 14
CERTIFICATE OF SERVICE 14

APPENDIX

(Supreme Court of Missouri's Opinion in *Sanders v. Daniel International Corporation*) A1

TABLE OF AUTHORITIES

Cases

Cox Broadcasting Corp. v. Cohn, 429 U.S. 469 (1975) 8
Dept. of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965) 11
Durley v. Mayo, 351 U.S. 277 (1956), *reh'g denied*, 352 U.S. 856 (1956) 9
Herb v. Pitcairn, 324 U.S. 117 (1945) 9
Houston v. Moore, 16 U.S. (3 Wheat.) 433 (1818) 8
Kennett v. Akers, 564 S.W.2d 41 (Mo. banc 1978) 13
Loftus v. Illinois, 333 U.S. 804 (1948) 9
Lucas v. Daniel International Corporation, 682 S.W.2d 820 (Mo. banc 1984) .....I, 1, 5, 6, 7, 9, 10, 13
Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548 (1945), *reh'g denied*, 324 U.S. 890 (1945) 7
Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874) 9
New York v. Cathedral Academy, 434 U.S. 125 (1977) 7
O'Dell v. Espinoza, 456 U.S. 430 (1982) 7-8
Pettus v. City of St. Louis, 242 S.W.2d 723 (Mo. 1951) 13
Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946) 7
Sanders v. Daniel International Corporation, 682 S.W.2d 803 (Mo. banc 1984) .....I, 5, 7, 9, 10
Standard Oil Co. v. Missouri, 224 U.S. 270 (1912) 11

Statutes

§ 477.010 Mo. Rev. Stat. (1978) 2
§ 506.030 Mo. Rev. Stat. (1978) 2
§ 512.160 Mo. Rev. Stat. (1978) 12, 13
28 U.S.C. § 1257 (1), (2) and (3) (1976) 2, 6

Court Rules

83.02 Mo. Rules of Court 3
83.09 Mo. Rules of Court 3
84.13 Mo. Rules of Court 4, 13
Rule 17, Supreme Court Rules 5, 10, 11

No. 84-1631

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVEN WALTER LUCAS,
Petitioner,

vs.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Respondent, Daniel International Corporation respectfully submits that the Petition for a writ of certiorari to the Supreme Court of the State of Missouri should be denied.

OPINION BELOW

The opinion of the Supreme Court of Missouri is found at *Lucas v. Daniel International Corporation*, 682 S.W.2d 820 (Mo. banc 1984), and is set out at Appendix A1 in Petitioner's Petition.

Petitioner's Request for Rehearing and Order Denying same is set out at Appendix A7 in Petitioner's Petition.

JURISDICTION

Respondent disagrees with Petitioner's Jurisdictional Statement in that this Court's interpretation of 28 U.S.C. § 1257 (1), (2) and (3) prohibits the granting of a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and Statutory Provisions set forth by Petitioner at pages 2-5 of his Petition, Respondent believes that the following Provisions are to be considered.

1. Section 477.010, Missouri Revised Statutes (1978), provides:

> The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being.

2. Section 506.030, Missouri Revised Statutes (1978), provides:

> If any part of this code shall be found to be in conflict or discordant with other parts of this code or with other statutes relating to civil procedure, the supreme court shall have power to promulgate rules necessary to harmonize the same so as to promote the orderly administration of justice. No such rule shall abridge, enlarge or modify the substantive rights of any litigant. Such rules shall be effective until superseded by legislative enactment.

3. Rule 83.02 of the Missouri Rules of Court provides as follows:

> A case in which an opinion has been filed in a district of the Court of Appeals may be transferred to this Court by order of a majority of the participating judges, regular and special, on their own motion or on application of a party, because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law. Application by a party for such transfer shall be filed within 15 days of the date upon which the opinion is filed.

4. Rule 83.09 of the Missouri Rules of Court provides as follows:

> This Court on its own motion, or an application of a party, may transfer to this Court from any district of the Court of Appeals a case in which no opinion has been filed, such transfer to be for any of the reasons stated in Rule 83.02 or for the purpose of equalizing the work load of the appellate courts. Any party requesting such transfer shall file an application in this Court within 10 days after the filing of the transcript on appeal in the appropriate Court of Appeals district. In connection with the consideration of an application for transfer under this rule, this Court may order the transcript of the record forwarded to it. Applications for transfer filed pursuant to this rule shall not affect the time for filing briefs unless this Court so orders. In the event of transfer under this rule, briefs already filed in the Court of Appeals shall be considered as having been filed in this court and briefs not yet filed in the Court of Appeals on the date of the order of transfer shall be filed directly in this Court within the time prescribed for filing briefs where no transfer is ordered.

5. Rule 84.13 of the Missouri Rules of Court provides as follows:

> (a) *Preservation of Error in Jury Tried Cases.* Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, no allegations of error shall be considered in any civil appeal from a jury tried case except such as have been presented to or expressly decided by the trial court.
>
> (b) *Materiality of Error.* No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.
>
> (c) *Plain Error may be Considered.* Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

STATEMENT OF THE CASE

In addition to the Statement of the Case set forth by Petitioner at pages 6-9 of his Petition, Respondent believes that the following material from the record should be considered in order to have a complete picture of the facts in this matter.

1. In Respondent's Motion for a New Trial, at paragraph number 6, Respondent objected to Jury Instruction No. 7.

2. Jury Instruction No. 7 is the instruction which contained the term "maliciously" which had to be defined.

3. Instruction No. 5 which defined the term "maliciously" was the instruction which was declared improper in the case of *Sanders v. Daniel International Corporation*, 682 S.W.2d 803 (Mo. banc 1984).

4. Counsel for petitioner and respondent in the instant action were also opposing counsel in *Sanders v. Daniel International Corporation*.

REASONS FOR DENYING THE WRIT

I.

Preliminary Statement

Petitioner's attempt to state the questions to be presented under Rule 21.1 is defective, because the questions are not stated in the terms and circumstances of the case.

The Supreme Court of Missouri did not exceed "the scope of its review power over civil judgments under state law" or violate "its own court rules" as stated.

As discussed under Part VI, *infra*, Missouri Statutes, Court Rules and case precedent all support the decision and manner by which the decision in *Lucas v. Daniel International Corporation*, 682 S.W.2d 820 (Mo. banc 1984), was reached. No incorrect standards governing the decision or review were used by the Supreme Court of Missouri.

No special or important questions for review appear on the surface or even lurk in the background of this case and none of the parameters of Rule 17.1 have been or can be distilled from the record of this case.

II.

The Supreme Court's Opinion Is Not a Final Judgment for Purposes of Certiorari

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (1), (2) and (3). See Petition, page 2. Section 1257 provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In order for this Court to accept jurisdiction over the instant matter, it must first consider the "threshold" question as to whether the decision handed down by the Supreme Court of Missouri in *Lucas v. Daniel International Corporation*, 682 S.W.2d 820 (Mo. banc 1984), constitutes

a "final judgment". *New York v. Cathedral Academy*, 434 U.S. 125, 128, n.4 (1977).

A state court judgment, to be within appellate jurisdiction of the United States Supreme Court, must be final in two senses: It must be subject to no further review or correction in any other state tribunal, and it must be an effective determination of the litigation and not of merely interlocutory or intermediate steps therein; it must be the final word of the final court. *Market St. Ry. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945), *reh'g denied*, 324 U.S. 890 (1945). Can it be said that there is nothing more to be decided or that there has been an effective determination of the litigation? *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946).

The Supreme Court of Missouri reversed and remanded *Lucas* for retrial on the basis of instructional error. *Lucas*, 682 S.W.2d at 821. *Lucas* was reversed and remanded to be consistent with another opinion which was handed down by the Supreme Court of Missouri on the same day. *See Sanders v. Daniel International Corporation*, 682 S.W.2d 803 (Mo. banc 1984); *Sanders* is also set out at A1 of this brief. The sole issue addressed by the *Lucas* decision was instructional error.

Respondent admits that the decision handed down by the Supreme Court of Missouri was rendered by the highest court in the State. However, there has not been an "effective determination of the litigation" since the matter was remanded for a new trial. When a state Supreme Court remands the case for trial, its decision is not final as an effective determination of the litigation and the United States Supreme Court does not have jurisdiction to review the matter. *O'Dell v. Espinoza*, 456 U.S. 430,

430 (1982); *Houston v. Moore*, 16 U.S. (3 Wheat.) 433, 434 (1818).

This Court has recognized four exceptions to the situation wherein a case is remanded for trial and the state court decision is final for purposes of review. *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469 (1975).

> [I]n the first two categories considered below, the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question. In the other two categories, however, the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts.

Cox, 429 U.S. at 478-79.

Petitioner has failed to put forth any type of argument or cite this Court to any authority which would place this Petition squarely within one of the aforementioned exceptions.

Petitioner's cause of action survives in the Circuit Court of Pettis County, Missouri. Petitioner asserts that Fourteenth Amendment protection extends to Judgments. If this is the case, then this Court would have to entertain petitions for writ of certiorari for every State Court Judgment that is or will be reversed and remanded.

III.

The Supreme Court of Missouri's Opinion Rests Upon an Independent and Adequate Non-Federal Ground

This Court has consistently stated that it will only review decisions from the highest State Court where it affirmatively appears from the record that a Federal question was presented to that court. Further, that a decision on the Federal question was necessary to the determination of the cause. Where a State Court decision might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain a judgment, the United States Supreme Court will not undertake to review the State Court's judgment. *Durley v. Mayo,* 351 U.S. 277, 281 (1956), *reh'g denied,* 352 U.S. 856 (1956). Stated succinctly, this court will not review judgments of State Courts that rest on adequate independent State grounds. *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590, 636 (1874); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945); *Loftus v. Illinois,* 333 U.S. 804 (1948).

A review of the opinion handed down by the Supreme Court of Missouri in *Lucas* reveals that it is based entirely on State substantive law and a change thereof. *Lucas* was reversed and remanded to be consistent with an opinion that was handed down by the Supreme Court of Missouri on the same day, the companion case of *Sanders v. Daniel International Corporation,* 682 S.W.2d 803 (Mo. banc 1984). *Sanders* and *Lucas* arose out of the same set of facts and circumstances. In the *Sanders* opinion, the Supreme Court of Missouri reviewed and discussed the law of malicious prosecution and modified the requirements thereof.

The modification in *Sanders* resulted in a change in Missouri's common law definition of malice as it relates to a malicious prosecution action.

This modification in the common law was the entire basis for the *Sanders* decision and subsequent basis for the *Lucas* decision. It cannot be argued that either the *Sanders* or *Lucas* opinion rested on substantial Federal grounds.

Petitioner's alleged Federal grounds rest in the fact that he was denied Constitutional considerations due to the Supreme Court of Missouri reversing and remanding the *Lucas* matter on an instructional error that was not presented or preserved for appeal. As discussed under Part VI, *infra,* the Supreme Court of Missouri may consider errors although those errors were neither presented to nor preserved for appeal. This Court is asked to review a decision handed down by the Supreme Court of Missouri which was based entirely upon the common law of Missouri and a change thereto. Accordingly, this Court should not assert jurisdiction and entertain this Petition for certiorari.

IV.

The Instant Case Does Not Present Special or Important Questions Which Warrant the Issuance of a Writ

This Court has delineated the classic questions considered proper for review by writ of certiorari. (Rule 17, Supreme Court Rules). While these categories are not controlling in determining whether this Court will hear a case, they do provide guidance for those litigants seeking an avenue of review. None of the enumerated considerations set out in Rule 17 are present in the instant case.

It is the duty of petitioner to show to this Court that this Court has jurisdiction over the instant case. *Dept. of Mental Hygiene v. Kirchner,* 380 U.S. 194 (1965). Petitioner has failed to cite this Court to any authority which conflicts with the decision of the Supreme Court of Missouri. As discussed in Part III, *supra,* petitioner has not put forth a substantial Federal question which would justify the granting of a writ. Certainly, no novel issues concerning the interpretation of Federal laws are set forth in this case which would require the ultimate resolution by this Court.

The instant case is an example of precisely the type of case this Court intended to refrain from reviewing when it drafted Rule 17.

V.

The Supreme Court of Missouri Considered Petitioner's Due Process Claims

Petitioner asserts that he was denied due process because he was not given notice and opportunity to be heard. These Constitutional considerations were first presented to the Court in petitioner's motion for rehearing. (See pages A7 through A9 of petitioner's brief). The Supreme Court of Missouri, without opinion, overruled petitioner's motion for rehearing.

Petitioner cites this Court to the case of *Standard Oil Co. v. Missouri,* 224 U.S. 270 (1912), which requires notice and opportunity to be heard, due process considerations. By allowing petitioner to file his motion for rehearing and subsequently considering said motion, the Supreme Court of Missouri did exactly what is required by the *Standard Oil* decision, to-wit: The Court allowed petitioner his notice and opportunity to be heard.

VI.

The Supreme Court of Missouri May Consider Errors Not Preserved for Appeal

Petitioner asserts that the Supreme Court of Missouri has exceeded its review power when it reverses and remands a civil judgment on the basis of instructional error when said instructional error was not expressly presented to or expressly decided by the trial judge.

Section 512.160, RSMo 1978, sets forth the type of questions which may be considered by an Appellate Court on appeal in the State of Missouri. The relevant portions of Section 512.160, for the purposes of the instant matter, are set forth as follows:

> 2. No Appellate Court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially effecting the merits of the action.
>
> 3. The Appellate Court shall examine the transcript on appeal and, subject to the provisions of subsections 1 and 2 of this section, award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as such court ought to have given, as to the Appellate Court shall seem agreeable to all. Unless justice requires otherwise the court shall dispose finally of the case on appeal and no new trial shall be ordered as to issues in which no error appears.

As petitioner asserts, the general rule is that in order for a question to be presented to the appellate court, said question must have been presented to and expressly decided by the trial judge. There is one notable exception to this

general principle which is specifically set out in the Missouri Rules of Court. (Rule 84.13, Missouri Rules of Court). Specifically, Rule 84.13(c) provides as follows:

> (c) Plain Error may be Considered. Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the Court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Petitioner asserts that by considering an instructional error not properly preserved, the Supreme Court of Missouri violated the terms and provisions of Section 512.160, Mo. Rev. Stat., 1978. This is simply not the case.

Under statutes authorizing Appellate Courts to give such judgments as trial courts should have given, plain errors affecting substantial rights may be considered on appeal, though not preserved for review. *Pettus v. City of St. Louis,* 242 S.W.2d 723 (Mo. 1951). This case illustrates how Rule 84.13 and Section 512.160 are intertwined and consistent with one another.

It is difficult to conceive what would be more prejudicial than an instruction which incorrectly states the law as to the definition of the requisite intent necessary to have committed the tort of malicious prosecution. The law in Missouri is clear that an error in an instruction is presumed to be prejudicial and should be reversed if it affects the merits of the action. *Kennett v. Akers,* 564 S.W.2d 41, 48 (Mo. banc 1978). An incorrect definition of the requisite intent affects the merits of the action.

By virtue of Section 512.160 and Rule 84.13, the Supreme Court of Missouri had the statutory authority to reverse and remand *Lucas* for trial on the basis of instructional error.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri should be denied.

Respectfully submitted,

HENDREN AND ANDRAE
JOHN H. HENDREN
(Counsel of Record)
KELLY POOL
GERALD E. ROARK
The Monroe House
235 East High Street, Suite 210
P. O. Box 1069
Jefferson City, Missouri 65102
(314) 636-8135
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the foregoing were mailed, postage prepaid, this 13th day of May, 1985, to Mr. Richard G. Callahan, Rost & Callahan, 109 East High Street, Jefferson City, Missouri 65101.

JOHN H. HENDREN

APPENDIX

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

Robert A. Sanders, Respondent,	)	
v.	)	No. 65529
Daniel International Corporation, Appellant.	)	

Appeal From the Circuit Court of Phelps County
Honorable Weldon W. Moore, Judge

This case involves a malicious prosecution action brought by respondent, Robert A. Sanders. At trial, the jury returned a verdict in favor of respondent, awarding him $100,000 in actual damages and $250,000 in punitive damages. We ordered the cause transferred after the Southern District affirmed the judgment. We reverse and remand.

The criminal prosecution forming the basis for this malicious prosecution action was a misdemeanor case in which respondent was charged with the attempted theft of tools and gauges valued over fifty dollars. Respondent was one of seven persons charged with that crime. The information was sworn to by the prosecutor following a conversation in his office with agents of appellant, Daniel International Corporation. The prosecutor dismissed the [2] misdemeanor action because he believed that insufficient evidence existed to proceed with the trial. Respondent then filed this action for malicious prosecution.

I

At the time the information was filed, appellant was engaged in the construction of a nuclear power plan [sic] in Callaway County, Missouri for Union Electric Company. The construction project required more than 2,700 workers, and the company had crews working day and night shifts. Union Electric owned all the tools used on the job, and pursuant to a contract appellant was responsible for and controlled the purchase, allocation and use of all the tools. The individual workers did not bring their own tools onto the job site. Appellant issued individual tool boxes to each worker, and the workers were allowed to keep their tool boxes in larger "gang boxes" assigned to each crew. The crew foreman kept each gang box locked. Additional tools could be checked out from a "tool room" and were to be returned to the tool room at the end of the day.

Prior to December 1978, tool theft and tool hoarding had been a recurring and expensive problem. Posted on the fence surrounding the job site were signs warning that persons caught removing tools from the project would be subject to prosecution. Pinkerton security furnished personnel to control perimeter access to the job site.

Respondent was a member of Crew 52, a night-shift pipefitting crew consisting of a foreman and eight crew members. On the morning of December 20, 1978, a day-shift pipefitting crew, Crew [3] 5, reported to work and discovered that its gang box had been broken into. The lock on the gang box had been cut with a pair of bolt cutters. A quick investigation revealed that a member of Crew 52, Gus Groves, had checked out bolt cutters from the tool room on the previous night. In the presence of Superintendent Terry Heers, security guards opened

the Crew 52 gang boxes with a master key. At the top of one of the gang boxes was a set of welding gauges, the hoses of which had been cut recently. These cuts matched the other ends of the hoses that remained in the Crew 5 gang box. Also present in a Crew 52 gang box was a pair of welding leathers belonging to a member of Crew 5.

Heers directed that an inventory be made of the tools in the Crew 52 gang boxes. The gang boxes and the individual tool boxes that were inside the gang boxes were emptied and all of the tools of a particular kind were put in a pile for inventory purposes. Some of the tools in the gang boxes were in individual tool boxes and some were not.

Next, Heers discussed the situation with Service Manager Gary Warblow and with Assistant Project Manager Wallace Sykora. They decided to go to the sheriff's office to discuss the problem. The sheriff sent Warblow and Heers to the prosecutor's office, where they met with Callaway County Prosecutor Gene Hamilton. Hamilton testified that Warblow and Heers initially asked him about the possibility of search warrants for the houses of seven members of Crew 52, and he told them that search warrants were not possible because (1) the seven people resided outside of Callaway County and the warrant would be limited to that county; and (2) there was [4] no showing that tools had been taken from the plant or that they were actually located in their houses. He said that no probable cause existed to search their houses. After a conversation lasting approximately a half hour, Heers and Warblow, at the suggestion of the prosecuting attorney, signed a blank complaint against respondent. Hamilton then filed an information upon which an arrest

warrant was issued. On February 15, 1979, Hamilton dismissed the charges against Sanders.

II

Appellant raises a number of issues on appeal. First, we must address appellant's argument that respondent failed to establish all of the elements of the tort of malicious prosecution, particularly the requisite "malice." This involves examining whether MAI 16.01 (1981) correctly defines malice for a malicious prosecution. MAI 16.01 provides, in part, that malice is "the doing of a wrongful act intentionally without just cause or excuse." Also involved is a determination of whether this same instruction should be used when instructing the jury on punitive damages in a case involving a malicious prosecution.

Actions for malicious prosecution have never been favorites of the law. There is almost universal agreement that sound public policy dictates that the law should encourage the uncovering and prosecution of crime. Any "policy that discourages citizens from reporting crime or aiding in prosecution would be undesirable and detrimental to society in general." Cates v. Eddy, 669 P.2d 912, 917-18 (Wyo. 1983). Courts have always recognized that "[m]alicious prosecution is an action which tends to dilute the [5] public policy of encouraging persons having knowledge of possible crimes to cooperate with public officers." Seelig v. Harvard Cooperative Society, 1 Mass.App. 341, 296 N.E.2d 825 (1973). *See also* Bonzo v. Kroger Grocery & Baking Co., 344 Mo. 127, 125 S.W.2d 75 (1939); Muza v. Cash Bargain Lumber Co., 586 S.W.2d 403, 406 (Mo. App. 1979). The nature of this cause of action, therefore, has led courts to require strict proof of each element of the tort. *See* L. Green, Judge and Jury 338 (1930). *See also* Higgins v. Knickmeyer-Fleer Realty & Investment

Co., 335 Mo. 1010, 74 S.W.2d 805 (1934); Hunter v. Karchmer, 285 S.W.2d 918 (Mo. App. 1955); Bellington v. Clevenger, 228 S.W.2d 817 (Mo. App. 1950). In a federal circuit court opinion, for example, Justice Washington noted that: "[i]n trials of actions of this nature, it is of infinite consequence to mark with precision, the line to which the law will justify the defendant in going, and will punish him if he goes beyond it." Munns v. De Nemours, 17 Fed. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9,926). The Virginia Supreme Court recently espoused this same attitude when it held that such actions "have been circumscribed by limitations more stringent than those applied to most other tort actions." Bain v. Phillips, 228 S.E.2d 576, 581 (Va. 1976). Numerous commentators also have expressed this sentiment, including Lord Holt more than a hundred years ago, Martin Newell at the turn of the century, and Prosser and Keeton during our own era. *See* N. Newell, Newell on Malicious Prosecution 21 (1892); W. Prosser, & W. Keeton, Prosser & Keeton on the Law of Torts 870-71, 882 (1984). *See also* Stewart v. Sonneborn; 98 U.S. 187 (1978); Alexander v. Petty, 35 Del.Ch. 5, [6] 108 A.2d 575, 577 (1954); Miller v. Pennsylvania R. Co., 371 Pa. 308, 89 A.2d 809, 810 (1952); Penton v. Canning, 57 Wyo. 390, 118 P.2d 1002, 1004-05 (1941); 52 Am. Jur.2d *Malicious Prosecution* § 81, at 187-89; 54 C.J.S. *Malicious Prosecution* § 3, at 954. We believe that this public policy coupled with current crime rates mandates that we reexamine the element of malice in a malicious prosecution as it is defined for the jury in our present MAI 16.01.

A person suing on a theory of malicious prosecution must plead and prove six elements: (1) the commencement of a prosecution against the plaintiff; (2) the instigation by the defendant; (3) the termination of the

proceeding in favor of the plaintiff; (4) the want of probable cause for the prosecution; (5) the defendant's conduct was actuated by malice; and (6) the plaintiff was damaged. S. Greenleaf, II Greenleaf on Evidence §§ 449-59 (2nd ed. 1844). *See also* Stafford v. Muster, 582 S.W.2d 670, 675 (Mo. banc 1979). We focus our attention on the fifth and crucial element of malice; and, because malice also justifies a punitive damage award, we must address the connection between the type of malice necessary to establish liability and that which is necessary to sustain an award of punitive damages.

The word "malice" connotes a culpable mental state, but the term lacks any uniform definition. In a well-researched opinion in 1917, the Arizona Supreme Court observed that "[t]here are different kinds and degrees of malice as well as the nature of the evidence going to prove its existence." Griswold v. Horne, 19 Ariz. 56, 165 P. 318, 323 (1917). Indeed, one eminent scholar [7] commented that the term is so "slippery" that it should be banished from the law. Ames, "How Far an Act May Be A Tort Because of the Wrongful Motive of the Actor," 18 Harv. L. Rev. 411, 422 n.1 (1905). We have retained the term and, not surprisingly, the different kinds and degrees of malice have often been confused throughout the development of the law in Missouri. The result is that we now utilize a single definition of malice and it is highly questionable whether it properly describes either the malice required to sustain a malicious prosecution or that required to sustain punitive damages in a malicious prosecution.

In general, the law recognizes three degrees of malice. First, there is malice in its universal sense as understood in the popular mind, which means "ill will, spite, personal hatred, or vindictive motives." Peasley v. Puget Sound

Tug & Barge Co., 13 Wash.2d 485, 125 P.2d 681, 689 (1942). Such malicious conduct is founded in ill will, "and is evidenced by an attempt to vex, injure, or annoy another." Davis v. Hearst, 160 Cal. 143, 116 P. 530, 537 (1911). *See also* 54 C.J.S. *Malicious Prosecution* § 41, at 1004. This type of malice is commonly referred to as "malice in fact" or "actual malice."

A second degree of malice is malice in its legal sense. The definition of legal malice has a broader meaning than the popularly understood definition of malice in fact. Malice in its enlarged legal sense embraces any improper or wrongful motive—that is, *malo animo*. *See* S.S. Kresge Co. v. Ruby, 348 So.2d 484, 489 (Ala. 1977); Brodie v. Hawaii Auto Car Deal. Ass'n, 2 Hawaii App. 316, 631 P.2d 600, 605 (1981), *rev'd on other grounds*, 655 [8] P.2d 863 (Haw. 1982); Owens v. Kroger Co., 430 So.2d 843 (Miss. 1983); Peasley v. Puget Sound Tug & Barge Co., *supra*, at 689. *See generally* 54 C.J.S. *Malicious Prosecution* § 41, at 1004. Some courts also have included within legal malice conduct which is so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or *malo animo*. *See e.g.*, Richter v. Neilson, 11 Cal. App.2d 503, 54 P.2d 54 (1936); Hugee v. Pennsylvania R. Co., 376 Pa. 286, 101 A.2d 740 (1954); Lewis v. Williams, 618 S.W.2d 299 (Tenn. 1981); Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). Although he incorrectly termed it "malice in law", Newell aptly defined this type of malice as something less than malice in fact and "simply . . . a general wickedness or intent on the part of a person; a depraved inclination to do harm, or to disregard the rights or safety of mankind generally." W. Newell *supra*, at 239.

Third, there is "malice in law." This degree of malice is properly defined as a wrongful act done intentionally

without just cause or excuse. *See generally* 54 C.J.S. *Malicious Prosecution* § 42, at 1005. The law imputes malice "to a wrongdoer from the *mere* intentional doing of a wrongful act to the injury of another without legal justification or excuse." Freezer v. Miller, 163 Va. 180, 176 S.E. 159, 168 (1934). *See also* Connelly v. White, 122 Iowa 391, 98 N.W. 144, 145 (1904). For example,

> [i]f one gives a perfect stranger unaware a blow with a deadly weapon likely to produce death, he does it of malice, because he does it intentionally without just cause or legal excuse. If he maims cattle without knowing whose they are, if he poisons a well of drinking water without knowing who is likely to drink of it, he does it of malice, because [9] it is a wrongful act and done intentionally without any legal justification or excuse. This is the malice of the law—a malice of pleading and proof made necessary by definitions of offenses against the law or the exigencies of the case. It is established by a conclusive legal presumption, and proof of malice in fact is not required.

Griswold v. Horne, *supra*, at 323. An all-too-often unrecognized difference exists between this type of malice in law and malice in its legal sense. The former rests upon a legal presumption independent of any proof concerning a defendant's mental state, while the latter requires either direct or indirect proof of a mental state somewhat less culpable than malice in fact. *See generally* L. Frumer & M. Friedman, 4E Personal Injury § 1.02[3] at 31 (1984).

The weight of authority clearly indicates that a malicious prosecution action can be supported only by either actual or legal malice. Malice in law is insufficient. A plaintiff must establish that the defendant acted either with ill will toward the plaintiff or from any other im-

proper motive. Treatise writers are in general agreement that, at the very least, an improper or wrong motive is essential. Justice Holmes, for example, commented upon the relevancy of a defendant's moral condition in such suits:

> Such a limitation would stand almost alone in the law of civil liability. But the nature of the wrong is peculiar, and, moreover, it is quite consistent with the theory of liability here advanced that it should be confined in any given instance to actual wrongdoing in a moral sense.

O. Holmes, The Common Law Tradition 113 (M. Howe ed. 1963). Over one hundred years later, Prosser and Keeton wrote:

> [10] The plaintiff has the burden of proving that the defendant instituted the proceeding "maliciously." This unfortunate word, which has so much vexed the kindred law of defamation, requires no less in the way of definition here. It means something more than the fictitious "malice in law" which has been developed in defamation cases as a cloak for strict liability. There must be "malice in fact." At the same time it does not necessarily mean that the defendant was inspired by hatred, spite or ill will; and there is authority that if his purpose was otherwise a proper one, the addition of the incidental fact that he felt indignation or resentment toward the plaintiff will not make him liable. As in the cases of qualified privilege in defamation, the courts seem to have looked to the primary purpose behind the defendant's action. If he is found to have acted chiefly to give vent to motives of ill will, "malice" is established. But it is found also where his primary purpose was merely something

> other than the social one of bringing an offender to justice . . .

W. Prosser & W. Keeton, *supra*, at 882-83. Other similar expressions may be found concerning the required type of malice.

> Ordinarily, in order to constitute malice supporting an action for malicious prosecution, there must be malus animus, denoting that the person who instituted the original proceeding was actuated by wrong motives.

54 C.J.S. *Malicious Prosecution* § 42, at 1004-05. *See also* T. Cooley, A Treatise on the Law of Torts 184 (1879); F. Pollock, A Treatise on the Law of Torts, 183, 392 (1894); 52 Am. Jur.2d *Malicious Prosecution* § 46, at 214. These authorities illustrate that while ill will, hatred or spite *may not be necessary* to establish the cause of action, the plaintiff must prove that the defendant was at least actuated by an improper or wrongful motive.

[11] Decisions from numerous state courts are no less forceful in asserting that more than malice in law is needed to establish the elements of a malicious prosecution. Some courts require actual malice, while other courts hold that malice in its legal sense is sufficient. The Arizona Supreme Court has held that "in this sort of action it is absolutely essential to its existence that malice in fact as distinguished from malice in law be present." Griswold v. Horne, *supra*, at 323. The North Dakota Supreme Court has held that legal malice is sufficient to support the action, and then it defined legal malice as "any unjustifiable motive." Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 562 (1897). The highest court of Virginia has also held that "[t]he malice which is an essential element of an action for a malicious prosecution is *actual* malice, or malice in fact, and its existence must be proven as any other fact."

Freezer v. Miller, *supra,* at 168. The court further defined actual malice as "malus animus, i.e., a wrong motive or purpose." *Id.* at 169. With the exception of all but a few state courts,[1] including Missouri, the overwhelming majority of decisions require ill will or some improper or wrongful motive. *See e.g.,* National Security Fire & Casualty Co. v. Bowen, 447 So.2d 133, 140 (Ala. 1983); Griswold v. Horne, *supra;* Albertson v. Raboff, 46 Cal.2d 375, 295 P.2d 405, 410 (1956); Suchey v. Stiles, [12] 155 Colo. 363, 394 P.2d 739, 741 (1964); Smith v. Globe Ford, Inc., 39 Conn. Supp. 27, 467 A.2d 1262, 1266 (1983); Stidham v. Diamond State Brewery, Inc., 41 Del. 330, 21 A.2d 283, 285 (1941); Ammerman v. Newman, 384 A.2d 637, 640-41 (D.C. 1978); Erp v. Carroll, 438 So.2d 31, 40 n.3 (Fla. App. 1983); Iowa Mutual Ins. Co. v. Gulf Heating & Refrig. Co., 184 So.2d 705, 706 (Fla. App. 1966); Brodie v. Hawaii Auto Ret. Gas Deal. Ass'n, *supra;* Berlin v. Nathan, 64 Ill.App.3d 940, 381 N.E.2d 1367, 1372 (1978); Carbaugh v. Peat, 40 Ill.App.2d 37, 189 N.E.2d 14, 19 (1963); Satz v. Koplow, 397 N.E.2d 1082, 1083 (Ind. App. 1979); Foltz v. Bock, 89 Kan. 381, 131 P. 587 (1913); Illinois Central R. Co. v. Anderson, 206 Ky. 600, 268 S.W. 311, 312 (1925); O'Connor v. Hammond Police Dept., 439 So.2d 558, 561 (La. App. 1983); Coleman v. Kroger Co., 371 So.2d 1186, 1189 (La. App. 1979); Glover v. Fleming, 36 Md.App. 381, 373 A.2d 981, 983 (1977); Sottile v. DeNike, 20 Mich. App. 468, 174 N.W.2d 148 (1969); Owens v. Kroger Co., *supra,* at 847; Harvill v. Tabor, 240 Miss. 750, 128 So.2d 863, 864-65

---

1. *See* Meraz v. Valencia, 28 N.M. 174, 210 P. 225 (1922); Brown v. Guaranty Estates Corp, 239 N.C. 595, 80 S.E.2d 645, 651 (1954); Eaves v. Broad River Elec. Cooperative, Inc., 277 S.C. 475, 289 S.E.2d 414, 416 (1982). An examination of these opinions and their adoption of a malice in law standard indicates a similar problem presently before this Court. *Cf.* Stanford v. A. F. Messick Grocery Co., 143 N.C. 449, 55 S.E. 815 (1906); Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961).

(1961); Miller v. Watkins, 653 P.2d 126, 131 (Mont. 1982); Hackler v. Miller, 79 Neb. 209, 114 N.W. 274 (1907); Martin v. City of Albany, 42 N.Y.2d 13, 364 N.E.2d 1304, 396 N.Y.S.2d 612 (1977); Rogers v. Barbera, 170 Ohio St. 241, 164 N.E.2d 162, 165 (1960); Fleet v. May Dept. Stores, Inc., 262 Or. 592, 500 P.2d 1054, 1059 (1972); Hugee v. Pennsylvania R. Co., *supra;* Curley v. Automobile Finance Co., 343 Pa. 280, 23 A.2d 48 (1941); Nagy v. McBurney, 120 R.I. 925, 392 A.2d 365, 367-68 (1978); Huntley v. Harberts, 264 N.W.2d 497 (S.D. 1978); Stringer v. Cross, 564 S.W.2d 121 (Tex. Civ. App. 1978); Creelman v. Svenning, 1 [13] Wash.App. 402, 461 P.2d 557 (1969); Consumers Filling Station Co. v. Durante, 79 Wyo. 237, 333 P.2d 691, 699-700 (1958); Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419, 422 (1974). *See also* Ga. Code § 51-7-2 (1982).

Some of these courts hold that legal malice also encompasses conduct which is "wrongful and willfully done, with a consciousness that is not according to law or duty." Wiggin v. Coffin, 29 Fed. Cas. 1157, 1159 (C.C.D. Me. 1836) (No. 17,634). *See also* Lunsford v. Dietrich, 9 So. 308, 310 (Ala. 1891); Nyer v. Carter, 367 A.2d 1375, 1378-79 (Me. 1977); Kolka v. Jones, *supra,* at 562; Margolis v. Telech, *supra.* Care must be taken to distinguish this type of malice from negligence:

> Malice is distinguishable from mere negligence in that it arises from absence of purpose. The characteristic of negligence is inadvertence or an absence of an intent to injure. This does not imply that the act was done involuntarily or unconsciously, but merely that the person doing it was not conscious that the act constituted a want of reasonable care. If so conscious the act becomes malicious. The books agree that the prosecution need not have been prompted by malevolence or any corrupt design, nor necessarily involve

> spite or hatred toward the person accused. It is enough if it be the result of any improper or sinister motive and in disregard of the rights of other . . . , or if done willfully and purposely . . . But to constitute malice there must have been (1) a motive or purpose, and (2) it must have been an improper one.

Jenkins v. Gilligan, 108 N.W. 237, 238 (Iowa 1906) (citations omitted). In short, the conduct must be such that a jury could infer and find an improper motive. Another court opined that "[w]hile it is a fact that a willful and wanton disregard for the [14] fact may be the basis for malice, such wanton and willful conduct must be of such a nature and character *as to evince a hostile or vindicative motive.*" Yelk v. Seefeldt, *supra*, at 8. (Emphasis added). The defendant's act is deemed improper because the defendant is consciously doing an act which he knows society regards as reprehensible. These opinions, therefore, demonstrate that the requisite legal malice is established when the defendant willfully institutes a criminal proceeding while conscious that such an action is wrong or unlawful. The defendant must either proceed with an improper or wrongful motive or consciously act with such wanton disregard for the rights of others that a jury may, but need not, infer from such conduct in improper motive.

Contrary to the weight of authority, Missouri has retained a malice in law standard for the definition of malice in malicious prosecution actions. "The element of malice in malicious prosecution is defined as the intentional doing of a wrongful act without legal justification. It may be inferred from the absence of probable cause and does not necessarily involve hatred or ill will." Parthenopoulos v. Maddox, 629 S.W.2d 563, 571 (Mo. App. 1981). *See also* Muza v. Cash Bargain Lumber Co., 586 S.W.2d 403, 406 (Mo. App. 1979); Palermo v. Cottom, 525

S.W.2d 758, 765 (Mo. App. 1975). This is essentially the definition found in MAI 16.01:

> The term ["malice"] ["malicious"] ["maliciously"] as used in this [these] instruction[s] does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse.

[15] Although Missouri has dubbed and titled this definition "legal malice," it is in fact what we have described as "malice in law." The instruction does not require the jury to find that the defendant acted with an improper purpose. Indeed, this is nothing more than the common generic definition of an intentional tort:

> [i]t is a general rule of the common law that a cause of action arises whenever one person, by an act not in the exercise of a lawful right, causes loss or does damage to another with an intent, either actual or constructive, to produce such harm, without just or lawful excuse or justifiable cause or occasion.

74 Am. Jur.2d, *Torts* § 18, at 635. Prosser and Keeton explain that this definition was intended for use in such cases where a "cloak for strict liability" was intended. W. Prosser & W. Keeton, *supra*, at 882. The two examples are defamation suits and suits for false arrest or imprisonment.[2] The Minnesota Supreme Court has appropriately noted that "[t]he malice which is the essential element of malicious prosecution is not, like the malice essential

---

2. *See generally* Harper, "Malicious Prosecution, False Imprisonment and Defamation," 15 Tex. L. Rev. 157, 164-65 (1937); 54 C.J.S. *Malicious Prosecution* § 41, at 1004. *See e.g.*, Griswold v. Horne, *supra*, David v. Hearst, *supra;* Hudson v. Garner, 22 Mo. 423, 433 (1856); Helming v. Adams, 509 S.W.2d 159 (Mo. App. 1974); McGill v. Walnut Realty Co., 148 S.W.2d 131 (Mo. App. 1941); Ullrich v. New York Press Co., 23 Misc. Rep. 169, 50 N.Y.S. Supp. 788 (1898).

in libel, slander, and false imprisonment, a mere fiction of the law; *it is a state of mind to be proven as a fact.*" Hanowitz, v. Great Northern Ry. Co., 122 Minn. 241, 142 N.W. 196, 197 (1913) (emphasis added). Not surprisingly, therefore, the few states, including Missouri, adopting this malice in law standard for malicious prosecution actions have been singled out for [16] criticism. *See* 54 C.J.S. *Malicious Prosecution,* § 42, at 1005; Freezer v. Miller, *supra,* at 168, n.8.

The malice in law standard in Missouri can be traced to two early decisions Goetz v. Ambs, 27 Mo. 28 (1858) and Hill v. Palm, 38 Mo. 13 (1866). *Goetz* involved awarding punitive damages in an assault case, and the Court equated malice with an intentional tort. Goetz v. Ambs, *supra,* at 33. In *Hill,* the Court without reasoning or discussion approved an instruction in a malicious prosecution action which was a combination of malice in fact and malice in law, thereby permitting recovery to be based on the lesser, malice in law. The instruction was as follows:

> There are two kinds of malice; malice in fact, and malice in law. The former, in common acceptation, means ill-will against a person; the latter, a wrongful act done intentionally. If, therefore, the jury believes from the evidence that the defendant caused plaintiff to be arrested for larceny . . ., and that the defendant was moved thereto by ill-will against the plaintiff, or that the prosecution was wrongfully instituted by the defendant . . . the jury must find for the plaintiff.

Hill v. Palm, *supra,* at 15. The *Hill* instruction was followed in Sharpe v. Johnston, 59 Mo. 557 (1875). In *Sharpe,* the jury was instructed that "[m]alice means a wrongful act done intentionally without legal justification or excuse." *Id.* at 571.

The Court in these early cases erroneously assumed that the definition of malice could be culled from defamation cases where malice served as a cloak for strict liability. The only citation supporting the instruction in *Goetz* is to a federal circuit court opinion. Goetz v. Ambs, *supra*, at 33. In that federal decision, however, Justice Story was interpreting a federal criminal [17] statute, and he relied heavily upon the language in Bromage v. Prosser, 4 Barn & C. 247 (1825). United States v. Taylor, 28 F. Cas. 31 (D. Mass. 1837) (No. 16,442). *Bromage* involved a defamation action and Judge Bayley held that malice was implied from the publication of false words in a case not involving privileged communications. Bromage, v. Prosser, *supra*, at 256. "[I]f the matter is slanderous, malice is implied, it is sufficient to prove publication; the motive of the party publishing are never gone into." *Id.* at 256. According to Bayley, this type of malice was defined as "a wrongful act, done intentionally, without just cause or excuse." *Id.* at 255. In *Sharpe*, the prevailing party supported the malice instruction by a citation to Buckley v. Knapp, 48 Mo. 158 (1871). Sharpe v. Johnston, *supra*, at 561. *Buckley*, however, involved the same kind of action as *Bromage* and the Court affixed malice where there was a mere publication of false words. Knapp, *supra*, at 161. *See also* Barber v. St. Louis Post Dispatch, 3 Mo. App. 377, 386 (1877).

The majority of Missouri cases involving malicious prosecution merely recite this malice in law standard without describing the state of mind sufficient to sustain the cause of action. *See e.g.*, Burris v. North, 640 Mo. 426 (1877); Callahan v. Caffarata, 39 Mo. 136, 143-44 (1866); Brant v. Higgins, 10 Mo. 451 (1847). The opinions generally acknowledge that malice is an essential element of the tort. *See e.g.*, Frampton v. Bieber, 204 S.W. 728 (Mo.

1918); Sharp v. Johnston, *supra,* at 575; Casperson v. Sproule, 39 Mo. 39, 42-43 (1866); Laylor v. Byrne, 51 Mo. App. [18] 578, 580 (1892); McGarry v. Missouri Pacific Ry. Co., 36 Mo. App. 340, 346 (1889). They most frequently find malice in the lack of probable cause rather than in the actor's state of mind.[3] *See e.g.,* Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479 (Mo. 1972); Keenoy v. Sears Roebuck & Co., 642 S.W.2d 665 (Mo. App. 1982); Hupp v. North Hill Lincoln-Mercury, Inc., 610 S.W.2d 349 [19] (Mo. App. 1980); Muza v. Cash Bargain Lumber Co., *supra;*

---

3. The rationale behind these decisions is that the facts which establish the lack of probable cause *may* also allow the jury to draw the inference that the defendant had a culpable mental state. *See e.g.,* Lambert v. Sears, Roebuck & Co., 280 Or. 123, 570 P.2d 357, 363 (1977). Unfortunately, a certain amount of confusion surrounds the statement that "malice may be inferred from the lack of probable cause," as Justice Linde of the Oregon Supreme Court explains:

> I have no doubt that the same evidence may prove that a defendant lacked probable cause to prosecute the plaintiff and also acted with malice. But it is a different proposition that the jury may infer malice "from the lack of probable cause," when the latter conclusion may arise from non-malicious causes such as negligence. While the second phrasing [that the lack of probable cause may be sufficient evidence of malice] may have originated merely as elliptical shorthand for the first, its effect is to invite the jury to find "malice" whenever they find that the defendant initiated the prosecution of plaintiff without probable cause.

Id. at 365 (Linde, J., concurring). *See also* Wills v. Noyes, 29 Mass. (12 Pick) 324, 326 (1832). A number of Missouri cases suggest that malice may be inferred from a lack of probable cause; these opinions, however, do not accurately reflect the law that malice may be inferred from the *facts* which establish the lack of probable cause:

> [M]alice is not an inference of law from the want of probable cause. Malice, however, need not be proved by direct and positive testimony, but may be inferred from the facts which go to establish the want of probable cause; and this is all that is meant when it is said that malice may be inferred from the want of probable cause.

Sharpe v. Johnston, *supra,* at 575-76. *See also* Christian v. Hanna, *supra,* at 43. We, therefore, discourage courts from using the "elliptical" phrase that malice may be inferred from a want of probable cause.

Palermo v. Cottom, *supra;* Boquist v. Montgomery Ward & Co., 516 S.W.2d 769 (Mo. App. 1974); Witt v. Kroger Co., 392 S.W.2d 15 (Mo. App. 1965).

Some opinions, however, suggest that the state of mind embodied in a legal malice standard is required to establish liability for malicious prosecution. A number of cases suggest implicitly that the plaintiff must establish that the defendant was actuated by either ill will or any improper motive. *See e.g.,* Randol v. Kline's Inc., 322 Mo. 746, 18 S.W.2d 500, 507 (1929); Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577, 580 (1887); Stocking v. Howard, 73 Mo. 25, 27 (1880); Pritchett v. Northwestern Mutual Life Ins. Co., 228 Mo. App. 661, 73 S.W.2d 815, 819 (1934); Van Nort v. Van Nort, 16 S.W.2d 642, 645 (Mo. App. 1929); Christian v. Hanna, 58 Mo. App. 37, 43 (1894); Trauerman v. Lippincott, 39 Mo. App. 478, 486-87 (1890); Staley v. Turner, 21 Mo. App. 244, 251 (1886); Meysenberg v. Engelke, 18 Mo. App. 346, 349-50 (1885). One opinion suggests that malice is established when the defendant acts recklessly, unreasonably and in gross disregard for one's rights when instituting a proceeding. Foster v. Chicago, B. & Q. R. Co., 321 Mo. 1202, 14 S.W.2d 561, 570 (1928).

Our courts, after having the case submitted on MAI 16.01 or one of its predecessors, in many instances have justified the finding of the jury by saying that the language in MAI 16.01 reflects the commonly expressed definition of willfulness. In a case interpreting the phrase "the intentional doing of a wrongful act without just cause or excuse," the Court explained that the [20] term "intentionally done" refers to the fact that the "defendant knew that it was wrong, knew that he had no just cause or excuse for so doing, and hence did it willfully and wantonly and in reckless disregard of the rights of the

other party." McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880, 882 (1904). This same interpretation of the language of MAI 16.01 exists in numerous other cases. *See e.g.*, Jones v. Phillips Petroleum Co., 186 S.W. 2d 868, 876 (Mo. App. 1945); Pritchett v. Northwestern Mut. Life Ins. Co., *supra*, at 819; Christian v. Hanna, *supra*, at 43; Trauerman v. Lippincott, *supra*, at 486. The concept of willfulness cannot properly be read into the language in MAI 16.01 post trial because nothing in the instruction requires that the defendant act willfully. *See generally* Freezer v. Miller, *supra*, at 168-69. Decisions construing the language in MAI 16.01 to include a willfulness component seem all the more questionable in light of other cases suggesting that the legal malice standard purportedly reflected in the instruction does not require that the defendant acted willfully or wantonly. *See e.g.*, Brown v. Sloan's Moving & Storage Co., 296 S.W.2d 20, 26 (Mo. 1956).

The case at bar leaves us no choice but to clarify the element of malice in malicious prosecution actions. In so doing we resolve the misunderstanding that has plagued this state's law for many years. We can no longer in good conscience sanction the use of MAI 16.01. The instruction reflects a definition of malice in law and does not indicate to the jury that the defendant had to have acted with the requisite culpable mental state. In the past the jury has been told that malice exists when the defendant does [21] a "wrongful act intentionally without just cause." The "wrongful act" "without just cause" is committed when the defendant acts without probable cause, an entirely separate element of the tort. All that has remained for the jury to determine is that the defendant act "intentionally." To a jury this suggests, as counsel for respondent argued in closing argument, that the initiation of the

prosecution was "not an accident." This fails to recognize the distinction between intention and malice. Intention refers to the defendant's intent to commit the act which causes the harm. *See e.g.*, Cover v. Phillips Pipe Line Co., 454 S.W.2d 507, 512-13 (Mo. 1970). The type of intent embraced in the concept of malice is quite different:

> The tort of malicious prosecution is an intended wrong, not only in the sense that the defendant, by his deliberate and voluntary act, invaded the plaintiff's interest but in the sense that he intended the wrongful result. This means that he must have committed the acts complained of primarily for the purpose of harming the plaintiff.

F. Harper & F. James, Jr., I The Law of Torts § 4, at 320 (1956). There must be intent to cause the harm and not merely to commit the act which causes the harm. The effect of MAI 16.01 is to place a premium on the absence of probable cause thereby relegating malice to a mere legal fiction, a legal inference or presumption. This is contrary to the weight of authority and we believe was never intended by your prior decisional law.

MAI 16.01 is further misleading because it states that malice "does not mean hatred, spite or ill will." Hatred, spite or ill will is necessary to establish malice in fact. Even courts [22] rejecting a malice in fact standard, however, hold that hatred, spite or ill will does not *necessarily* have to be proven. *See e.g.*, Lampert v. Judge & Dolph Drug Co., *supra*, at 1098; Palermo v. Cottom, *supra*, at 765 Beatty v. Puritan Cosmetic Co., *supra*, at 819; Christian v. Hanna, *supra*, at 43. *See also* Iowa Mutual Ins. Co. v. Gulf Heating & Refrig. Co., 184 So.2d 705, 706 (Fla. App. 1966); Stanford v. A. F. Messick Grocery Co., *supra*, at 817; Huntley v. Harberts, *supra*, at 501. By in-

forming the jury that malice does *not mean* hatred, spite or ill will instead of informing the jury that malice does *not necessarily mean* hatred, spite or ill will, MAI 16.01 goes one step further in suggesting to a jury that mere intent to do an act that the law subsequently classifies as wrongful is sufficient.

In Haswell v. Liberty Mutual Insurance Co., 557 S.W.2d 628 (Mo. banc 1977), this Court discussed adopting the Restatement definition of malice for malicious prosecution of civil proceedings. The passing years, the ever increasing problem of crime, and the need for effectively carrying out the public policy of urging citizens to aid in the prosecution of crime now mandates that we reach a different result with respect to malicious prosecution actions arising from a criminal proceeding. The Restatement of Torts (Second) § 668 (1965) provides: "To subject a person to liability for malicious prosecution, the proceedings must have been initiated primarily for a purpose other than that of bringing an offender to justice." This definition, while not requiring proof of malice in fact, will require proof of legal [23] malice and bring Missouri back into step with the majority of jurisdictions.

Having held that MAI 16.01 improperly defines the element of malice in malicious prosecution actions, MAI 23.07 (1981) should be modified so as to incorporate the Restatement definition.[4] We believe that respondent should be afforded a new trial to determine whether or not appellant acted with the degree of malice necessary to sustain the cause of action. Zimmerman v. Associates Discount Corp., 444 S.W.2d 396 (Mo. banc 1969).

---

4. The second paragraph of MAI 23.07 should be amended as follows: "Second, in so doing defendant acted primarily for a purpose other than that of bringing an offender to justice and acted without reasonable grounds, and." The term "reasonable grounds" still requires definition. MAI 16.05 (1981).

III

Two reasons suggest that MAI 16.01 can no longer be used to instruct the jury on punitive damages in a malicious prosecution action.[5] First, MAI 16.01 is inadequate to instruct the jury on even the required mental state for liability. A higher degree of malice should be required to justify punitive damages. Second, the weight of authority indicates that actual malice or something akin to actual malice is generally necessary to justify a punitive damage av ard in malicious prosecution cases.

[24] Under current Missouri law, the malice in law standard for liability in a malicious prosecution also is used to satisfy the type of conduct necessary for punitive damages. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S.W. 1055, 1060 (1903), and Carp v. Queen Ins. Co. 203 Mo. 295, 101 S.W. 78, 97 (1907), suggested that actual malice was needed to support a punitive damage award in a malicious prosecution action. In Foster v. Chicago B. & Q. R. Co., *supra*, at 572, however, the Court held that the type of malice necessary for liability was also sufficient to justify punitive damages. *See* Dye v. Loewer, 94 S.W.2d 948, 953 (Mo. App. 1936). The Court apparently based its decision upon a Missouri case involving punitive damages in another form of action and upon a United States Supreme Court case. It should be noted that the United States Supreme Court case relied upon in *Foster* required some willful conduct or reckless indifference to the rights of others, and "[t]he tort is aggravated

---

5. The jury was instructed under MAI 10.01 that if appellant's conduct was "willful, wanton, or malicious," then it could also assess punitive damages against appellant. The Notes on Use to MAI 10.01 indicate that "malicious" must be defined for the jury, and that definition is found in MAI 16.01. Consequently, because the definition of malice described by MAI 16.01 is insufficient to justify awarding punitive damages, we again focus our attention on MAI 16.01.

by the evil motive, and on this rests the rule of exemplary damages." Milwaukee & S.P. R. Co. v. Arms, 91 U.S. 489, 493 (1876). The misapplied rule announced in *Foster* found its way into the mainstream of our law without a full and accurate consideration of the issue.

The standard expressed by MAI 16.01 and approved in *Foster* conflicts with the prevailing view that punitive damages should not be awarded in a malicious prosecution action unless the defendant's mental state reflects something akin to actual malice. Some courts, of necessity, demand the presence of actual malice because of their requirement that actual malice is necessary to establish liability. Commentators generally observe that to [25] justify punitive damages there must be "personal ill will or oppressive conduct in the prosecution." W. Prosser & W. Keeton, *supra*, at 888. Another source suggests that there must be actual malice "or where the proceedings complained of were commenced under circumstances of oppression, wantonness, or a reckless disregard of plaintiff's rights." 54 C.J.S. *Malicious Prosecution* § 114, at 1106.

Many courts have held that actual malice is "required to support an award of punitive damages in an action for malicious prosecution." Annot., 94 A.L.R.3d 791, 795 (1979). One observer notes that "[m]any states require proof of malice more in the lay sense of personal hatred, spite or ill will." G. Douthwaite, Jury Instructions on Damages in Tort Actions 437 (1981). Courts either require a higher degree of culpability before awarding punitive damages than they do for liability or they require more stringent proof of malice for punitive damages than for liability. *See e.g.*, Adams v. Whitefield, 290 So.2d 49 (Fla. 1974); Jones v. Gwynne, 306 S.E.2d 574 (N.C. App. 1983), *cert. denied*, Jones v. McArnold Corp., 310 S.E.2d 292

(1984); Stanford v. A. F. Messick Grocery Co., *supra,* at 817-18; Rogers v. Barbera, *supra,* at 164-65; Lee v. Southland Corp, 219 Va. 23, 244 S.E.2d 756, 759 (1978); Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 152 S.E.2d 271 (1967). In First National Bank of St. Mary's v. Todd, 283 Md. 251, 389 A.2d 371 (1978), the Maryland court acknowledged that the majority rule is that actual malice was necessary to justify awarding punitive damages. *Id.* at 373-74. *See also* Rizza v. Gill, 24 Conn.Sup. 256, 189 A.2d 794 (1963); Ross v. Kerr, 30 [26] Idaho 492, 167 P. 654, 656 (1917); Mardelli v. Stamberg, 44 N.Y.2d 500, 406 N.Y.S.2d 443, 377 N.E.2d 975 (1978); Sparrow v. Vermont Savings Bank, 95 Vt. 29, 112 A. 205, 207 (1921); McFarland v. Skaggs Co., Inc., 678 P.2d 298, 302-04 (Utah 1984). It should also be noted that a number of jurisdictions indirectly require actual malice in malicious prosecutions through their general policy of requiring actual malice for all punitive damage awards.[6]

MAI 16.01 does not express adequately the degree of culpability required for punitive damages in malicious prosecution cases. The public policy surrounding malicious prosecutions dictates that we follow the majority rule that actual malice is required for punitive damages in a malicious prosecution action. We believe that the definition of malice set forth in the treatise co-authored by our brother Blackmar articulates the correct standard and suggests the form of a proper instruction: "An act or a failure to act is 'maliciously' done, if prompted or

---

6. *See generally* A.B.A., Model Jury Instructions For Business Tort Litigation 34 (1980); J. D. Ghiardi & L. J. Kircher, Punitive Damages: Law and Practice § 5.04, p. 18 (1984); W. Prosser & W. Keeton, *supra,* at 10-11; K. Redden, Punitive Damages (1980); L. A. Stein, Damages and Recovery: Personal Injury and Death Action 369 (1972); 25 C.J.S. *Damages* § 123, at 1141-43. *See also* Restatement of Torts (Second) § 908.

accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member." E. Devitt & C. Blackmar, 3 Federal Practice and Instructions § 85.11, at 121 (3rd ed. 1977).

To the extent that either our prior cases or MAI 16.01 conflicts with the degrees of malice we have found necessary to [27] support malicious prosecution and punitive damages therein, they can no longer be followed. The need to encourage citizen assistance and participation in the enforcement of our criminal laws compels this long overdue reexamination of the law of malicious prosecution.

The cause is reversed and remanded for retrial consistent with this opinion.

WARREN D. WELLIVER, Judge

Higgins, Billings and Donnelly, JJ., concur; Blackmar, J. concurs in result in separate opinion filed; Rendlen, C.J., dissents in separate opinion filed; Gunn, J. dissents in separate opinion filed.

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

ROBERT A. SANDERS, Respondent,	)	
vs.	)	No. 65529
DANIEL INTERNATIONAL CORPORATION, Appellant.	)	

OPINION CONCURRING IN RESULT

I agree that the judgment should be reversed and the case remanded for new trial.

Judge Welliver soundly traces the history of malicious prosecution actions in Missouri, and convincingly demonstrates that the instruction approved as MAI 16.01, proceeding from the law applied in defamation cases "does not require the jury to find that the defendant acted with an improper purpose." I agree that more rigorous standard should be applied to malicious prosecution cases.

The extensive quotations in the principal opinion simply show that other courts have struggled with the problems inherent in suits for malicious prosecution and related actions, but give very little guidance to counsel as to the kind of instruction which will be approved. The several expressions are not wholly [2] consistent. Inasmuch as this Court freely prescribes instructions to be used in civil cases, I believe that we should do so in this one. The Court, with the help of the MAI Committee, may of course make future revisions and amendments as may be necessary or desirable.

I.

If Judge Gunn is correct in his conclusion that plaintiff failed to make a submissible case under the presently prevailing law there would be no need to go into detail about appropriate instructions for future cases. I am inclined to believe, however, that the jury could have found that the defendant's agents led the prosecutor to believe that they could produce evidence to support charges against each of the seven suspects, with reference to their individual tool boxes when the agents knew that the tools had been commingled before any inventory was taken. Prosecutor, now judge, Hamilton testified as follows:

CROSS-EXAMINATION

Q Okay. What information was it that they had given you for probable cause to believe that Robert Sanders and the other 6 crew members had committed the crime of attempted theft?

A Well, they indicated that the tools from the tool box that had been broken into were found in the gang number 52 gang box and also in the individual boxes in that gang box. And these were the 7 individuals whose names were given to me as being on crew number 52.

* * *

REDIRECT EXAMINATION

Q Mr. Hamilton, if there had been stolen tools in each of the individual tool boxes, you could have proceeded with the trial [3] and prosecuted them without confessions; isn't that true?

* * *

A If there had been stolen tools that were identifiable in each of the individual tool boxes, I think that's correct.

Q You could have proceeded and then you wouldn't have needed the confessions?

A That's right.

The portions of the witness's examination quoted by Judge Gunn do not destroy the effect of this testimony.

There would remain, under the new standard proposed in the principal opinion, the question of the intent of the defendant's agents. I agree with the statement in the principal opinion that "conduct which is so reckless or wantonly and willfully in disregard of one's rights that a trier of fact could infer from such conduct bad faith or *malo animo*" is within the concept of legal malice. The plaintiff should have the opportunity for a new trial under the revised standard. There is also the possibility of additional evidence and of argument about the permissible inferences from all the evidence directed to the revised standard.

II.

Although I do not disagree with the statement in Restatement of Torts (Second) § 668 (1965), that "To subject a person to liability for malicious prosecution, the proceedings must have been initiated primarily for a purpose other than that of bringing an offender to justice," this statement hardly serves as a definition [4] of malice and I do not believe that it should be the subject of a verdict-directing instruction or an essential definition. The instructions, rather, should speak in affirmative terms as to what the plaintiff must show. Section 668 speaks of the conduct which will not give rise to liability but

is silent as to the showing which the plaintiff must make. I believe that it would serve the purpose of revised Missouri law as enunciated in the principal opinion if MAI 23.07 were left intact and if an instruction in the following terms were substituted for the required definition of "maliciously," now found in MAI 16.01, in malicious prosecution cases:

> The term "maliciously" as used in this (these) instruction(s) means acting intentionally with an improper or wrongful motive, or consciously acting with wanton disregard for the rights of others.

Just as with MAI 16.01, the definition could be built into MAI 23.07 or made the subject of a separate instruction.

If this were done then juries would be appropriately instructed as to the mental state required of the defendant. No longer would we have a situation in which the defense of malice "does not indicate to the jury that the defendant had to have acted with the requisite culpable mental state." There may be speculation regarding the appropriateness of the continued use of MAI 16.01 in other actions in which malice is in issue. It would be inappropriate for us to extend our present holding to cases other than malicious prosecution cases, but counsel might consider a conservative approach in the definition of malice, in [5] possibly anticipating further reexamination of the prevailing standard.

I also agree that there is a need to modify the present MAI 10.01 as to the allowance of punitive damages in malicious prosecution cases. Although it might have been thought that a verdict for the plaintiff in a malicious prosecution case necessarily connoted entitlement to punitive damages, in the discretion of the jury, there is clear precedent for a contrary holding in Rustici v. Weidemeyer,

673 S.W.2d 762 (Mo. banc 1984), which held that a defendant might recover actual damages in a claim for false arrest without being entitled to submit punitive damages.

The instruction recommended in the principal opinion[1] is unduly restrictive, and does not give plaintiffs the alternatives, found in the model from which it was taken of demonstrating that the defendant's act was "wantonly" or "oppressively" done. I would hesitate to hold that a plaintiff must necessarily demonstrate "personal hatred, spite or ill will." The focus rather should be on a purpose of causing harm. I would commend for malicious prosecution cases an instruction in lieu of the present MAI 16.01, in the following language:

> If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number ..... (here insert number of plaintiff's verdict directing instruction) was willful or wanton and was wrongfully done for the purpose of causing injury, then in addition to any damages to which you find plaintiff entitled under Instruction Number ..... (here insert [6] number of plaintiff's damage instruction), you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter him and others from like conduct.

This plaintiff, under the evidence, should have the opportunity to submit the issue of punitive damages under the revised instruction. I cannot say that a jury could not find a wrongful intent to cause injury.

For the reasons stated, I concur in the result reached by the principal opinion.

---

1. 3 Devitt and Blackmar, Federal Jury Practice and Instructions, 3d Ed., § 85.11.

Inasmuch as these views do not commend the support of a majority of the Court, counsel will have to proceed as best they can in the framing of instructions, with no assurance my suggestions will be ultimately approved. This task is difficult when counsel are not required to make specific objections to the substance of instructions, and so lawyers will have to get along as best they can in the position in which the majority opinion leaves them.

CHARLES B. BLACKMAR, Judge

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

ROBERT A. SANDERS, Respondent,	)	
v.	)	No. 65529
DANIEL INTERNATIONAL CORPORATION, Appellant.	)	

DISSENTING OPINION

I respectfully dissent and would reverse the judgment of the trial court for the reasons set forth in the dissenting opinion of Judge Gunn. However, I feel it important to provide guidance for the Bench and Bar in this and similar cases and accordingly if retrial is necessary I subscribe to the jury instruction forms suggested in the separate opinion of Judge Blackmar concurring in result.

ALBERT L. RENDLEN, CHIEF JUSTICE

(Filed December 18, 1984)

SUPREME COURT OF MISSOURI
EN BANC

ROBERT A. SANDERS,	)	
Plaintiff-Respondent-Cross-Appellant,	)	
vs.	)	No. 65529
DANIEL INTERNATIONAL CORPORATION,	)	
Defendant-Appellant-Cross-Respondent.	)	

DISSENTING OPINION

On the facts of the case, I would reverse the judgment.

As the majority opinion recites, the second element of a cause for malicious prosecution is the instigation of proceedings by the defendant. To impose liability, the institution of prosecution must be in the form of some affirmative action by way of advice, encouragement, pressure, or otherwise. *Palermo v. Cottom,* 525 S.W.2d 758, 763 (Mo.App. 1975). There is no liability for merely reporting the truth, *Rustici v. Weidemeyer,* 673 S.W.2d 762, 767 (Mo. banc 1984), or merely giving information which leads to a prosecution. *Palermo v. Cottom, supra.* That is what happened here.

An examination of the record in the light most favorable to the plaintiff leads to the same conclusion as expressed in Judge Flanigan's concurring opinion when the case was before the Southern [2] District: "There is nothing in the record to indicate that either Warblow

or Heers bore an actual hatred or malice towards Sanders and it is doubtful that even a most charitable view of the evidence would support a finding that either of them intentionally lied to the prosecutor." There is no evidence that Warblow or Heers acted for any purpose other than that of bringing to justice those responsible for the taking of missing tools. Defendant must necessarily rely on his witness, Prosecuting Attorney Hamilton. Hamilton indicated that he misinterpreted or misunderstood some of the information given him by defendant. The crucial misunderstanding concerned the ability of defendant to provide the prosecutor with an inventory of the specific stolen tools, indicating from which individual tool box each tool was recovered. Hamilton subsequently learned that this was not possible for two reasons. First, a number of the tools could not be identified with any precision. Second, defendant had placed all the tools from each crew member's tool box into a single large pile, thereby foreclosing the possibility of an inventory from each worker's tool box. The prosecutor testified that he was not intentionally misled concerning these facts:

Q. Based upon what you were told then and what you later learned through the various aspects of the investigation you conducted, were the facts as given you on December 20 by Mr. Warblow and Mr. Heers substantially correct?

. . . .

A. The facts were substantially correct.

Q. Okay. Now, you don't feel then, Mr. Hamilton, that you were misled in any way by the facts that were given you?

A. No, I don't think I was intentionally misled. I think I misinterpreted some things.

[3] Q. Well, any misinterpretation was on your part and not on the basis of what they told you?

A. All I can say is what they told me. And my interpretation was something different than we later found the facts to be.

Q. Well, but that—any misinterpretation of that kind would have been misinterpretation on your part and not on what they told you;—

A. That's correct.

He testified further as follows:

Q. Were you able to do—did they indicate they wanted something done, if possible?

A. Well, yes, they were concerned about the matter.

Q. What else, then, did you tell them?

A. I indicated that based on what they had told me—the information that they had given me, that charges for attempted stealing—that we did have probable cause for that.

. . . .

Q. Okay. Now, at any time in this, Mr. Hamilton, was there any urging or pressing or anything of that kind from the Daniel's people for you to file these charges?

A. No. There was concern, obviously, but it was my decision to file the charges.

Q. You understood they wanted something done?

A. Right.

Q. But did you understand that they wanted it done within the framework of the law?

A. That's my understanding.

Q. And they didn't ask you to overreach or go ahead with something that you didn't feel should be done?

A. No, it's a good thing that they didn't.

[4] Q. Okay. Why do you say that?

A. I wouldn't have done it under those circumstances at all.

The strongest inference possible from all the witnesses is that defendant's employees may have unintentionally contributed to a misunderstanding on the part of the prosecutor concerning the facts surrounding the theft. Such conduct is insufficient to make a case for malicious prosecution.

The following statement from *La Font v. Richardson*, 119 S.W.2d 25 (Mo.App. 1938), is appropriate: "when it is shown that the prosecuting witnesses consult the prosecuting attorney in good faith, and communicate to him all the ascertainable facts, and acting on his advice institute the criminal proceedings . . . they should be exonerated." *Id.* at 29. This language pertains to the instant case. Here, it was the prosecutor who suggested that Heers and Warblow sign the blank complaint. The defendants were not the parties who initially suggested the institution of proceedings. They had only sought a search warrant to aid in the solution of the crimes of theft. Their suggestion was rejected by the prosecutor. Thus, there is no issue of probable cause confronting this Court. *See Moad v. Pioneer Finance Co.*, 496 S.W.2d 794 (Mo. 1973) in which Judge Higgins gives full explanation to the essential element of probable cause in malicious prosecution and finds, *inter alia*, that mere dismissal of a complaint

does not create "any inference of want of probable cause" nor rebut the prima facie case of probable cause. *Id.* at 799.

[5] I cannot translate the prosecutor's suggestion of prosecution and subsequent dismissal of charges into sufficient evidence to support an action of malicious prosecution.

The sum and substance of the facts of this case lead to the plain and single conclusion that there is no evidentiary support for a malicious prosecution action.

Additionally, in this case, the definition of "malice" makes no difference. There simply was no malice here by any definition.

GEORGE F. GUNN, JR., Judge